Supreme Court, U.S.
FILED

No. 94-941560 MAR 20 1995

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE STATE OF NEW YORK,

Petitioner,

—against—

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a FAME COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioner
120 Broadway
New York, New York 10271
(212) 416-8025

VICTORIA A. GRAFFEO
Solicitor General

LILLIAN Z. COHEN*
JUNE DUFFY
TIMOTHY L. COLLINS
Assistant Attorneys General
Of Counsel

*Counsel of Record

QUESTION PRESENTED

Is the heightened scrutiny analysis, including the "essential nexus" test, developed by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. Tigard*, 114 S. Ct. 2309 (1994), applicable in testing the validity of a statute of general application which regulates the use of property, and does not involve administrative imposition of an allegedly unconstitutional condition in exchange for a discretionary government benefit?

LIST OF PARTIES

In addition to the respondents listed in the caption, Lenox Hill Hospital, a New York not-for-profit corporation, was a named defendant and appeared in the state courts, while T. O'Connor, C. Rogers, D. Huczel, K. Moore, N. Kolan and I. Liebel, the employees of Lenox Hill Hospital who occupy the apartments in issue, were designated as defendants below, but did not participate or appear by counsel.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner State of New York respectfully prays that a writ of certiorari issue to review the opinion and judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 84 N.Y.2d 385, 643 N.E.2d 479 (1994) and is reproduced in the appendix at 3a-45a. The opinion of the Appellate Division, First Department is reported at 196 A.D.2d 728, 602 N.Y.S.2d 93 (1st Dep't 1994) and is reproduced in the

appendix at 48a-61a. The opinion of the Supreme Court, New York County is reported at 154 Misc.2d 982, 586 N.Y.S.2d 726 (Sup. Ct. N.Y. Co. 1993) and is reproduced in the appendix at 62a-74a.

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 20, 1994. By orders dated January 10, 1995 and February 13, 1995 (reproduced in the appendix at 1a and 2a, respectively), the Honorable Ruth Bader Ginsburg extended the time in which to file a petition for a writ of certiorari to February 17, 1995, and March 19, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Takings Clause of the Fifth Amendment of the United States Constitution and Chapter 940 of the Laws of 1984 which amended the Emergency Tenant Protection Act and the Rent Stabilization Law.

The applicable constitutional and statutory provisions are reproduced in the appendix at 75a-83a.

STATEMENT OF THE CASE

Statutory Framework

The authority of states and localities to adopt controls on rents and evictions, along with other pricing measures, is rooted in the traditional police powers reserved to the states. In New York City and State, rent regulation, in one form or another, has been maintained for over 50 years, based on

periodic reviews of vacancy rates and other housing market conditions which have shown that emergency conditions continue to exist.

While New York's regulations have included subsidiary provisions concerning tenure, habitability and related matters, their primary purpose is to limit the unreasonable escalation of rents in a rental housing market driven by scarcity. Legislative discretion to craft remedial measures of this sort has long been held to fit well within constitutional parameters.[1] This case involves a challenge to that assumption based, *inter alia*, on the purported applicability of this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) ("*Dolan*"), and the extent to which those decisions require the judiciary to review legislative determinations in this area.

At issue in this case is an amendment of the New York City Administrative Code, Chapter 940 of the Laws of 1984, which restored the right of not-for-profit hospitals to lease rent-stabilized apartments for the use of hospital employees. The protections afforded under the amendment were previously available under the City's Rent Stabilization Law, and were inadvertently eliminated when the Legislature enacted the Omnibus Housing Act of 1983, Chapter 403 of the Laws of 1983.

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[1] *See Block v. Hirsch*, 256 U.S. 135 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Woods v. Cloyd W. Miller, Co.*, 333 U.S. 138 (1948); *Greene v. Mirabel*, 485 U.S. 983 (1988); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *see also* Bergman, *Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord-Tenant Relationship*, 1989 Annual Survey of American Law 691.

See also Twentieth Century Association v. Waldner, 294 N.Y.S. 571, 63 N.E.2d 177 (1945) (sustained law establishing commercial rent control in New York City); *Teeval Co. v. Stern*, 301 N.Y. 346, 93 N.E.2d 884, *cert. denied*, 340 U.S. 876 (1950) (sustained New York's post-war rent control law).

New York's Rent Stabilization Law, Local Law 1969, N. 16 ("RSL") was enacted in 1969 in order to alleviate the housing crisis which persisted in New York City notwithstanding the existence of previously enacted rent control laws. The RSL was and continues to be based on findings and a declaration of emergency by the New York City Council, which states, *inter alia*, that:

> a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York . . . ; that *such emergency necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents*; * * * that unless residential rents and evictions continue to be regulated and controlled, disruptive practices and abnormal conditions will produce serious threats to the public health, safety and general welfare; preventive action by the council continues to be imperative; that *such action is necessary in order to prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare*; that the transition from regulation to a normal market of free bargaining between landlord and tenant, while still the objective of state and city policy, must be administered with due regard for such emergency * * * The council further finds that * * * such increases were being exacted under stress of prevailing conditions of * * * an acute housing shortage * * *.

N.Y. Unconsol. L. § 26-501 (Emphasis supplied).

The general object of this new law was to neutralize the effects of the housing shortage on rent increases by eliminating "unreasonable" rents and securing "fair" rents for both landlords and tenants. N.Y. Unconsol. L. § 26-510[h]. The law contemplated that fair rents would be established for a broad

class of tenants experiencing bargaining disadvantages, and drew no distinctions based on the income level of tenants or apartment location.[2] Thus, the central concern was to eliminate the effects of the housing shortage on rent levels, and not to guarantee permanent tenure or affordable rents for all affected tenants.

Between 1969 and 1983, the RSL was amended or modified on several occasions, as the Legislature attempted to address changing conditions and practices in the rental market. Of relevance here is the enactment in 1983 of the Omnibus Housing Act ("OHA") which, *inter alia*, sought to prevent non-resident tenants from exploiting the housing shortage by subletting their stabilized apartments to subtenants at a premium. Under the OHA, the tenant of record had to maintain the apartment as his primary residence in order to remain eligible for protection under the RSL, whereas, previously, the protections extended to subtenants as well.

Approximately four months later, the Legislature determined that further amendment of the RSL was necessary to remedy an unintended consequence of the OHA as it affected not-for-profit hospitals which were the tenants of record and which had sublet stabilized apartments to their employees. In order to protect these housing employee programs, which were jeopardized when landlords invoked the OHA in seeking to recover apartments sublet to hospital employees, the Legislature enacted Chapter 940 of the Laws of 1984.[3]

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[2] *See A Report to the Mayor on an Investigation into Rental Increases in the Non-controlled Housing Market, February, 1969*, authored by the City's Housing and Development Administration and Department of Consumer Affairs, which included the results of a survey that showed, *inter alia*, extraordinary rent increases in certain areas of New York City. "Geographically, tenant responses [to the survey] were concentrated in the traditionally high rent areas of the City, and most heavily in large newer buildings (less than 10 years old). *Id* at 2.

[3] During the four months between the effective date of the OHA and the adoption of Chapter 940, Lenox Hill Hospital alone faced sum-

Chapter 940 amended both the Emergency Tenant Protection Act (section 8625[11]) and the Rent Stabilization Law (section 26-504[a][1][f]) to provide that:

> For the purposes of this subparagraph [limiting application of each law to primary tenancies] where a housing accommodation is rented to a not-for-profit hospital for residential use, affiliated subtenants authorized to use such accommodations by such hospital shall be deemed to be tenants * * * *

L 1984, ch 940, §§ 1, 3. In addition, Chapter 940 exempted hospital tenants from time limitations in subletting, permitting subtenants to occupy apartments for the full term of the tenant's lease; placed limits on the landlord's right to refuse subtenants of hospital tenants; and granted to affected landlords a special rent increase to substitute for vacancy increases that might otherwise have been available to them (ch 940, §§ 2, 4). (78a-80a, 81a-82a) The effect of the OHA and Chapter 940 was to limit the abuse of private sublets, while allowing a legitimate, albeit small, class of tenants to provide housing for their employees at stabilized rents, as they had in the past.

Factual Background

In the early 1960's, Lenox Hill Hospital ("Lenox Hill") entered into leases covering 18 apartments (the "Apartments") in a building then owned by respondent landlord's predecessor in interest. The parties recognized that the Apartments would be used by Lenox Hill employees. (63a) The Apartments became subject to the Rent Stabilization Law in 1969, long before the landlord purchased the building in 1976. (49a) Until commencement of this action in 1991, the leases were consistently renewed by the parties, except that Lenox Hill

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mary proceedings involving approximately 100 apartments it had leased. *See* Letter of Allan C. Anderson, President of Lenox Hill Hospital to Yvonne Scruggs-Leftwich, Commissioner of New York State Division of Housing and Community Renewal, BILL JACKET, L 1984, ch 940, at 29.

discontinued leasing three of the original eighteen apartments. (63a)

The close accommodations provided by the Apartments allowed Lenox Hill to attract qualified medical personnel more easily, and gave it some assurance that these personnel would be available upon short notice in the case of medical emergencies requiring their presence. The Respondent is not the only landlord renting property to Lenox Hill for this purpose. Nor is Lenox Hill the only hospital to engage in the practice of renting groups of apartments for the use of its personnel.[4]

Proceedings Below

On September 25, 1991, the landlord brought this action in Supreme Court, New York County, seeking a judgment that Chapter 940 effected an unconstitutional physical and regulatory taking by depriving it, *inter alia*, of its reversionary interest in the Apartments.[5] By judgment entered January 8, 1993, the Supreme Court (Altman, J.), dismissed the complaint and declared Chapter 940 to be constitutional. (62a-74a)

The court concluded that the landlord had failed to meet its burden of rebutting the presumption that Chapter 940 was constitutional. In particular, it found that Chapter 940 did not

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[4] *See* Mailgrams in support of the amendment from the Dean of the Nursing School and the General Director of the Beth Israel Medical Center in New York City, which was faced with the same problem as Lenox Hill, BILL JACKET, L 1984, ch 940, at 36-7. The Bill Jacket also contains a letter from Lenox Hill Hospital to the New York State Commissioner of Housing and Community Renewal, urging her to support the legislation and stating, *inter alia*, that the Association of Hospital Housing Administrators, which represents twenty non-profit hospitals in "Metropolitan New York . . . actively sought the enactment of legislation to correct [the] problem" precipitated by passage of the OHA. *Id.* at 29.

[5] The landlord abandoned its claim of a physical taking after it was rejected by the trial court on the basis of this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522 (1992). (18a)

effect a regulatory taking under the standard applied by the New York Court of Appeals in *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 107, 542 N.E.2d 1059, 1065 (1989), a case which involved, *inter alia*, an unconstitutional condition, as well as a physical taking. *Seawall* relied upon this Court's decision in *Nollan* in holding that a government regulation may constitute a regulatory taking (1) if it denies an owner economically viable use of his property, or (2) if it does not substantially advance legitimate state interests. (67a)

The court held that Chapter 940 met the second prong of the *Nollan/Seawall* test because, in passing Chapter 940, the Legislature determined that the principal goal of the Rent Stabilization Law, *i.e.*, curbing oppressive conduct and profiteering by landlords, is advanced by providing protection to Lenox Hill and its employees, as is the goal of promoting the general health and welfare of the public. (72a)

With respect to the first prong of the *Nollan/Seawall* standard, the court held that the landlord had failed to demonstrate that it was denied an economically viable use of its property. (73a) The court rejected the landlord's claim that the Lenox Hill leases denied the landlord its reversionary interest in the Apartments, concluding that the landlord had not shown that the alleged deprivation was different than it would have been if the Apartments had been rented to individuals. (73a) Additionally, Chapter 940 did not cause the landlord to suffer economic harm because the statute allowed it to collect a 15% surcharge, which the landlord had collected, and which was available only because the tenant of record was a not-for-profit hospital. (73a)

The court also found that Chapter 940 had not interfered with the landlord's " 'distinct investment-backed expectations' " for it had purchased the building, "with knowledge of Lenox Hill's leases," long before enactment of the OHA. (73a) Moreover, the landlord's purpose then, as now, was to rent the apartments, not sell them.

On appeal, the Appellate Division, First Department affirmed on the basis of the lower court's decision. Two justices dissented. (48a-61a)

After hearing argument twice[6], the New York Court of Appeals, with two dissents, reversed the Appellate Division, observing that "the statute does not protect and benefit specific occupant sub-tenants, but rather enacts a subsidized housing regime for Lenox Hill Hospital's preferential allotment." (4a) Citing *Nollan*, the court held that Chapter 940 "suffers a fatal defect by not substantially advancing a closely and legitimately connected state interest." (4a) The court read *Nollan* as "placing [no] limitations or distinctions or classifications on the application of the essential nexus test," and further concluded that it was required to consider whether there was a close causal nexus even if the legislation had no economic impact. (10a)

In applying the test, the court recognized that protection against profiteering was at least one purpose of the rent stabilization system. Thus, it noted that ". . . the State intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own . . . and to 'forestall profiteering, speculation and other disruptive practices.' " (5a, citations omitted) However, it proceeded to find that Chapter 940 was unconstitutional because it "does not contribute" to "[t]he central, underlying purpose" of the Rent Stabilization Law, which is to "ameliorate the dislocations and widespread lack of suitable dwellings." (12a) In particular, it cited the small number of units involved and the fact that the "apartments were subject to rent stabilization prior to the enactment and [would] remain so, irrespective of the outcome of this . . . dispute . . ." (12a) Accordingly, although the undeniable effect of Chapter 940 was to equalize the bar-

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[6] Two judges recused themselves before the first argument and were replaced by two members of the Appellate Division for the second argument.

gaining power between landlords and a class of tenants which the Legislature intended to protect, the court concluded that "Chapter 940 fails to *substantially or functionally* prevent or relate to excessive rents or profiteering." (12a) (Emphasis supplied). Instead, in the court's view, the statute bestowed a benefit which it repeatedly characterized as a subsidy. (4a, 10a, 12a) In addition, although the Apartments in issue will remain rent stabilized and simply be occupied by other tenants who are protected by the RSL, the court asserted that its decision flowed from a "proper adjudication," and "not a societal or policy preference of [the Court's] making." (12a)

The court also cited tenant security as an "overarching goal" of the RSL and determined that that goal was not served here because hospital employees may be "evicted" when their employment ends. (14a) The court did not acknowledge, however, that the "eviction" is not a function of the rental relationship, but results from termination of the employment relationship. Nor did it acknowledge that passage of Chapter 940 had prevented landlords from evicting Lenox Hill and its subtenants from apartments under the OHA.

Two judges filed separate dissents. Judge Levine concluded that "the majority has mistakenly applied a per se standard to an as-applied, purely regulatory takings claim," thereby disregarding the landlord's "utter failure to show that [it] suffered any economic loss to [its] investment . . ." (17a) or any impact on its investment-backed expectations. (17a, 21a) In his view, the court should have applied the standard set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), especially where, as here, the landlord challenged the application of "an economic regulation of a business enterprise."[7] (17a)

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[7] As evidence that the landlord had failed to satisfy its burden under *Penn Central*, Judge Levine cited, *inter alia*, the fact that the Apartments will remain stabilized if Lenox Hill is evicted, and the fact that the landlord purchased the building with knowledge that it was rent stabilized and subject to Lenox Hill's leases. (22a)

Based on his analysis of this Court's decision in *Dolan*, Judge Levine concluded that the close causal nexus test applied by the majority is limited to cases involving "the regulatory imposition of conditions of permanent physical occupation which would otherwise constitute a per se taking." (32a) However, until "the Supreme Court speaks definitively on whether its rule in *Nollan* and *Dolan* applies generally to all takings challenges," or the majority "reappraises its reading of *Nollan* as so applying," Judge Levine felt constrained by the Court of Appeals' earlier decision in *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92 (1989) to apply the test in this case.[8] In light of the "statutory framework" of the RSL, and the relevant legislative history, which "easily supports a legislative determination that non-profit hospitals have special needs" to be protected under the RSL (29a), he concluded that Chapter 940 survives heightened scrutiny.

Judge Levine faulted the majority for improperly selecting among the purposes of the rent laws in concluding that Chapter 940 failed to advance a legitimate state interest. "Even under the heightened judicial scrutiny standard," Judge Levine wrote, "a court is not permitted to pick and choose among express purposes of the legislation in employing the test of whether the requisite connection exists between the particular regulation and the problems the Legislature sought to ameliorate." (26a) Finding that, "at least one of the original primary purposes of the rent stabilization laws was to 'prevent speculative, unwarranted and abnormal increases in rents' and 'to forestall [landlord] profiteering, speculation and

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[8] In *Seawall*, the challenged ordinance imposed a moratorium restricting the conversion, alteration or demolition of single room occupancy buildings in New York City. While the court did not explicitly invoke the unconstitutional conditions doctrine in *Seawall*, it did find that the City's inclusion of a "buy out" option to the moratorium amounted to an unlawful form of "ransom". *Id.* at 113. *See Resolution Trust Corp. v. Diamond*, 18 F.3d 111, 121 (2d Cir. 1995), in which the Court of Appeals for the Second Circuit characterized the ordinance in *Seawall* as "coercive."

other disruptive practices,' " Judge Levine concluded that Chapter 940 "directly and undeniably serves the legislative protective and preventive goals with respect to abnormal rental increases and landlord profiteering". (26a) Judge Levine further found no justification for invalidating the law because of its purported underinclusiveness. (30a, 31a)

Judge Levine read the legislative history as supporting the conclusion that (a) exclusion of not-for-profit hospitals under the OHA was inadvertent (27a, 28a); (b) conditions that "impelled" the adoption of the RSL, *i.e.*, "apartment scarcity and artificially inflated rents—created a crisis for the hospitals by jeopardizing their ability to maintain adequate staffing" and (c) "the crisis was not unique to Lenox Hill" (28a), as the majority assumed.

Judge Ciparick also dissented, finding that "[t]he close causal nexus between Chapter 940 and the [Rent Stabilization Law] is that Chapter 940 implements a means of addressing the serious public emergency of housing people in New York City by continuing the protections of the [law] for particular tenancies already subject to rent stabilization". (36a) Judge Ciparick emphasized the fact that Chapter 940 reinstituted pre-existing protections and that the wisdom of this approach is a matter of legislative discretion. (37a) Judge Ciparick argued that "the majority impinges upon the State's prerogative to proportionally extend the scope of the [Rent Stabilization Law] consistent with its declaration of emergency, and its underlying goals which are legitimate state interests deserving protection". (40a)

As to the majority's claim that Chapter 940 benefits "one special class" (13a), Judge Ciparick wrote, "[b]y characterizing Chapter 940 as a statute that diverts and subverts the equal treatment regime, the majority not only ignores the realities of rent stabilization in the urban center, but tips the balance in favor of the party that already had unequal bargaining power. This is exactly the oppressive behavior the [Rent Sta-

bilization Law], as amended by Chapter 940, seeks to forestall." (43a)

Reasons for Granting the Writ

Review by this Court is warranted for two important reasons. First, the New York Court of Appeals, an influential state court of last resort, has, for the first time, applied the heightened scrutiny standard of review for regulatory takings claims, developed by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), to a case involving a general legislative determination which requires no dedication of any previously recognized property right, includes no element of forced physical intrusion on the property and imposes no condition on the granting of a discretionary government benefit. This application of these cases was in error.

Second, in assessing the legitimate state interest at issue, the New York Court of Appeals stretched beyond all previous applications, *Nollan*'s essential nexus test and *Dolan*'s requirement of "rough proportionality" (*Dolan*, 114 S. Ct. at 2318) by assessing more than simply the fit between the burden imposed on the affected owner and the public purpose to be served. Instead, notwithstanding its protests to the contrary, the court engaged in a quintessential legislative assessment of the effects of rent regulation, finding that such regulations subsidized certain tenants at the expense of landlords. In so doing, the court flatly overrode legislative findings that such regulations were necessary to forestall abnormal rent levels *and* to protect a particular class of the renting public from profiteering and eviction. Moreover, by describing the effects of such regulations as a form of subsidy, the court gave legal cognizance to a property interest which had never received such recognition during a lawfully declared housing emergency premised on abnormal market circumstances. The court thus substituted its judgment for that

of the Legislature in determining which class of persons should benefit from such protections. Even if the *Nollan/Dolan* nexus tests apply, which New York disputes, this finding had nothing to do with the connection between the purpose of the legislation and its functional impact.

ARGUMENT

THE COURT SHOULD CLARIFY WHETHER THE ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY TESTS DEVELOPED IN *NOLLAN* AND *DOLAN* ARE APPLICABLE IN DETERMINING THE CONSTITUTIONALITY OF LEGISLATION OF GENERAL APPLICATION WHICH REGULATES THE USE OF PROPERTY

In a series of cases decided prior to its decision in *Nollan*, this Court developed a two-prong test for determining whether legislation affecting the use of property is unconstitutional under the Takings Clause of the Fifth Amendment. The Court held that such legislation will be sustained if it does not deny an owner the economically viable use of his land, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138, n.36 (1978), and it "substantially advance[s] legitimate state interests." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In *Nollan*, and subsequently in *Dolan*, the Court interpreted the second prong of this test as requiring heightened scrutiny in cases which involve an exaction from the property owner in exchange for approval of a development permit.[9] Contrary to the assumption of the court below, however, this Court has yet to declare that heightened scrutiny is appropriate, much less required, where legislation of general

[9] The term "heightened scrutiny" has reference here to the close causal nexus/rough proportionality tests developed in *Nollan* and *Dolan*, and not the additional scrutiny which is required in determining whether an action substantially advances a legitimate state interest, as opposed to having a rational basis. *See Williamson v. Lee Optical of Oklahoma*, 348 U.S. 485, 488 (1955).

application is challenged as a regulatory taking. Nor should it do so.

In *Nollan*, this Court considered a facial challenge to an ordinance of the California Coastal Commission ("Commission") which required that a beachfront property owner grant an easement allowing the public to pass laterally across the beach portion of the property in exchange for a permit to build on the property. *Nollan*, 483 U.S. at 832. The asserted purpose of this condition was to foster visual access to the beach. The Court opined that had California demanded the easement outright, such action would have constituted a physical taking. *Id.* at 831. Further, the Court assumed, without deciding, that the Commission could deny a building permit in order to fulfill the governmental purpose. *Id.* at 836. The Court concluded that where a condition is imposed as a *quid pro quo* for granting a permit, it must serve the same purpose as a denial of the permit, in order to establish a sufficient "nexus" between the condition and the governmental purpose. *Id.* at 836-37. The Court determined that the condition imposed in *Nollan* lacked even a reasonable nexus with the stated purpose, and, therefore, held that the condition resulted in an unconstitutional taking. *Id.* at 838.

The facts in *Nollan* did not require the Court to determine how close a nexus must exist between the condition and the government's purpose in order to survive scrutiny. However, last Term, in *Dolan*, the Court answered this question, and held that once the threshold nexus has been established, the exaction placed on a development permit must be "roughly proportional" to the impact of the proposed development. In addition, the Court imposed the burden of proving the fit on the municipality and not on the challenger. *Dolan*, 114 S. Ct. at 2318.

In *Dolan*, a property owner sought permission from the city to replace her hardware store with a much larger facility and to pave a parking lot. The city conditioned approval of

Dolan's application on two exactions. First, to facilitate its flood control system, the city required Dolan to dedicate to the city the portion of her land falling within the floodplain of a nearby creek. *Id.* at 2314. Second, Dolan was required to dedicate a fifteen-foot-wide strip of land, adjacent to the floodplain, to permit the continued development of the city's pedestrian/bicycle pathway system. *Id.*

Invoking the "well-settled doctrine of 'unconstitutional conditions' " (*Id.* at 2317), the Court declared that the exactions could be upheld only if the burdens placed on Dolan's property were related to the costs that the development would impose on the community. *Id.* The Court first determined that an essential nexus existed between the state interest and the conditions because the city's effort to limit development in the floodplain and in the business district would further the legitimate public purpose of flood and traffic control. *Id.* at 2317-18. Only after reaching this conclusion did the Court turn to the question of the degree to which the city was required to tailor the exactions demanded to the impact of the proposed development. After examining the standards utilized by various state courts when faced with the same problem, the Court held that a "reasonable relationship" must exist between the conditions imposed and the projected effects of the development. *Id.* at 2318. However, the Court rejected the term "reasonable relationship" as too easily confused with the rational basis standard of scrutiny under the Equal Protection Clause, and chose the phrase "rough proportionality" to describe its new regulatory test. *Id.* The Court concluded that the city has the burden of justifying the required dedication by "mak[ing] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

Both *Nollan* and *Dolan* concerned (1) coercive actions on the part of the regulators; (2) regulations that went so far as to impose a physical intrusion on the properties; (3) specific exactions, *i.e.*, an easement in *Nollan*, a pathway in *Dolan*, in

return for permits; and (4) individual, site-specific determinations made by adjudicative boards. Thus, the Court emphasized in *Dolan* that the "conditions imposed [by the city] were not simply a limitation on the use petitioner [Dolan] might make of her own parcel, but a requirement that she deed portions of the property to the city." 114 S.Ct. at 2316. The Court also distinguished between an "adjudicative decision to condition petitioner's application for a building permit on an individual parcel," in which case the city has the burden of justifying its decision, and an evaluation of "most generally applicable zoning regulations," where the burden of showing that the regulation is "arbitrary" rests on the party who challenges it. *Id.* at 2320, n.8.

Based on their facts, and the distinctions drawn by the Court, *Nollan* and *Dolan* would appear to establish a rule which is only applicable in testing the constitutionality of similar exactions. Indeed, this Court granted certiorari in *Dolan*, 114 S. Ct. 544 (1993), expressly because the Oregon Supreme Court had rejected the applicability of the *Nollan* "essential nexus" test to an exaction case. *Dolan*, 114 S.Ct. at 2316. *See also Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993), *cert. granted and judgment vacated*, 114 S. Ct. 2731 (1994), an exaction case, which this Court remanded to the California Court of Appeals, Second Appellate District Court, for adjudication consistent with *Dolan*.

This conclusion is supported by the fact that each of the state court cases examined by the Court in developing the rough proportionality standard concerned the requirement of a municipality that a developer dedicate land or pay a fee as a condition precedent for approval of the development.[10]

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[10] *See, e.g., Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964) (planning board's requirement of a dedication of land or payment of a fee as condition precedent for approval of subdivision held constitutional); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966) (same); *but cf. Pioneer Trust & Savings Bank*

Notwithstanding the particular factual context in which *Nollan* and *Dolan* were decided, the New York Court of Appeals applied the heightened scrutiny standard of review to a case involving a general legislative determination which regulated the use of property and required no dedication of any previously recognized property right, contained no element of forced physical intrusion on the property, imposed no "unconstitutional condition" on the granting of a discretionary government benefit, and made no site-specific determination of any kind. Further, the Court of Appeals read the *Nollan/Dolan* tests as admitting of absolutely no exceptions, and, instead, as establishing "a principle for all property and land-use regulation matters," which it characterized as "a uniform, clear and reasonably definitive standard of review in takings cases." (9a-10a)

As Judge Levine pointed out in his dissent, however, even prior to *Dolan*, some commentators had interpreted *Nollan*'s requirement of a close causal nexus as applying only to the regulatory imposition of conditions of permanent physical occupation, citing Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1608-09; Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 949-50, n.146, 149; Tribe, *American Constitutional Law*, § 9-4, at 599, n.20 [2d ed.]. (32a) Moreover, the Court indicated in *Nollan* that the "adjective" in the "substantial" advancement prong allowed the Court "to be particularly careful. . . where the actual conveyance of property is made a condition to the

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v. Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (ordinance requiring subdivider to dedicate land to public use in return for approval struck down as a taking where problems sought to be remedied by statute were not caused by subdivision). *See also Simpson v. North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) (same); *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (ordinance requiring cash payment in lieu of land dedication upheld); *Collis v. Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976) (ordinance requiring dedication of land for parks as condition for subdivision approval upheld); *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (same); *Call v. West Jordan*, 606 P.2d 217 (Utah 1979) (same).

lifting of a land-use restriction" (483 U.S. at 841), thereby suggesting that the "adjective" may be used more flexibly in other contexts.

While employment of the standards developed in *Nollan* and *Dolan* may be well suited to circumstances involving "some sort of individualized determination [where] the required dedication" (*Dolan*, 114 S. Ct. at 2319-20) involves a measurable portion of an established property interest, the extension of such exacting standards to legislation of general applicability is inappropriate. Significantly, throughout the development of these standards, the Court has been careful to recognize the need to permit some reasonable level of latitude so that legislatures can address complex public problems. As the majority observed in *Dolan*, " '[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the *general law*.' " 114 S. Ct. at 2316 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)) (Emphasis supplied). This case illustrates why application of the heightened scrutiny standard to general legislation of the kind at issue here is inappropriate.

Chapter 940 was enacted as part of a regulatory scheme which, historically, has been held to address a legitimate state interest. *See, e.g., Yee v. City of Escondido*, 503 U.S. at 519, 112 S.Ct. at 1529 ("We have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' " (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982))); *see also Pennell v. City of San Jose*, 485 U.S. 1, 12, n.6 (1987) (same); *Seawall Assocs. v. City of New York*, 74 N.Y.2d at 105, 542 N.E.2d at 1064 (court acknowledged that landlord-tenant regulations have been upheld which imposed restrictions "on existing tenancies where landlords had voluntarily put their properties to use for residential housing."). *See also* Justice Scalia's dis-

senting opinion in *Pennell* in which he explained the nexus between the anti-profiteering purpose of rent regulation and the elimination of excessive rents:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate [the principle of not forcing some individuals to bear public burdens alone] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy . . . The same cause-and-effect relationship is popularly thought to justify emergency price regulation: When commodities have been priced at a level that produces exorbitant returns, the owners of those commodities can be viewed as responsible for the economic hardship that occurs. . .
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> When excessive rents are forbidden, . . . landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, *because they can plausibly be regarded as the source or beneficiary of the high rent problem.*

485 U.S. at 20, 22 (Emphasis supplied).

The principal purposes of Chapter 940, which amended New York's rent regulation scheme, were to further the RSL's goal of limiting profiteering in New York's troubled residential market and to restore protections to a group of tenants who, like all other consumers in this scarce market, remain vulnerable to excessive rents. Application of the standard of heightened scrutiny to such legislation, which merely amends the complex legislative scheme already in place, effectively precludes the Legislature from making necessary, incremental changes in response to altered conditions, as they occur.

The lengthy history of rent regulation in New York City has been characterized by three qualities, among others: (1) public purposes which include the forestallment of "profiteering, speculation, and other disruptive practices tending to produce threats to the public health, safety, and general welfare" in the unusual rental marketplace of New York City; (2) a degree of legislative creativity and experimentation in the regulation of rents in light of shifting economic circumstances throughout the State; and (3) efforts through the RSL to engage the participation of landlords and tenants in a rent stabilization scheme that provides for higher rent increases, while still limiting speculative profit. In the course of this history, the Legislature has necessarily distinguished among different classifications of housing, including: date of construction (L 1950, ch 250; New York City Loc L 1969, N. 16), geographic location (L 1950, ch 250), type of use (L 1959, ch 695), size (L 1953, ch 321), duration of owner occupancy (L 1953, ch 321), and other factors. On occasion the Legislature has modified the regulations and then regretted such amendment, subsequently reinstituting and even expanding prior restrictions (L 1971, ch 371; L 1974, ch 576).

It is significant that although the landlord here does not challenge all aspects of rent regulation, but merely a specific amendment, the Court of Appeals nonetheless held that the Legislature could not self-correct and adjust in a manner consistent with the initial stated purposes of the RSL. Thus, in this case, application of the heightened level of scrutiny inappropriately led the court to hold that the Legislature could not extend the protections of rent regulation to a particular class of tenants even though (a) the statute in issue "regulat[ed] rents in the relevant sense of preventing ren s that are excessive," *Pennell*, 485 U.S. at 22 (Scalia, J. dissenting), (b) the class was originally protected, and the landlord purchased the property with knowledge that it was subject to rent-stabilized leases held by the hospital, and (c) the class was inadvertently excluded from protection pursuant to a statute intended to

prevent an undesirable practice under the RSL, in which this class did not engage.

As the dissents correctly emphasized, the court below discounted these legitimate legislative considerations, finding that the State's interest in preventing excessive rents was not "substantially advanced," because, *inter alia*, in its view, the number of apartments affected was small, and they were subject to the RSL regardless of the outcome of this suit. The logical conclusion of this exacting analysis is that an amendment by the Legislature could not survive scrutiny unless the Legislature acted on a broader scale, *e.g.*, by extending protections to all corporate tenants, and/or extending the RSL protections to apartments which were previously not stabilized. Nothing in *Nollan* or *Dolan* suggests that this Court intended such a result when it adopted the heightened scrutiny test for determining whether a state interest has been "substantially" advanced. Yet this is what the landlord argued below, and what the Court of Appeals held.

Application of the heightened scrutiny standard to general legislative enactments which regulate the use of property may also lend itself to a degree of judicial oversight and discretion which this Court has long held to be inappropriate. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 486 n.16 (1987). Again, this case is illustrative. The court below not only felt free to pick and choose among the purposes of the legislation in examining its validity, but also, ultimately substituted its own judgment for that of the Legislature, concluding that only individuals should be permitted to enjoy the protections of rent stabilization, and not non-profit hospitals. Thus, it rested its holding on a determination that, when applied to not-for-profit hospitals, as opposed to other classes of tenants protected by the Legislature, the statute failed to produce fair rents and, instead, resulted in unconstitutional "subsidies." (4a, 10a,12a) It is evident that the court second-guessed the Legislature, notwithstanding its protests to the contrary, given the fact that the Apartments were, and will

remain, rent stabilized (12a, 17a), regardless of whether they are occupied by Lenox Hill's employees.

In finding that Chapter 940 allowed not-for-profit hospitals "to provide subsidized housing benefits to its chosen employees" (10a), the court ignored the fact that each affected apartment was subject to the RSL. Therefore, each apartment provided the landlord with a fair rent and a fair rate of return on its investment. Accordingly, Lenox Hill did not receive a "subsidy" from the landlord under the RSL, and the fact that Lenox Hill was able to provide what the court below called a "perk" to its employees is constitutionally irrelevant, especially since the Apartments will remain rent stabilized. (12a)

Chapter 940 is therefore different from the hardship provision challenged in *Pennell*, which allowed the City of San Jose to *reduce* a fair or reasonable rent otherwise payable to the landlord if a tenant could prove financial hardship. Although the Court found that the challenge in *Pennell* was premature because it did "not present a sufficiently concrete factual setting for the adjudication of the takings claim. . . ." (*Pennell*, 485 U.S. at 10), Justice Scalia, in his dissent, concluded that the San Jose ordinance resulted in an unconstitutional taking because it could result in *less* than a fair rent. *Id.* at 21.[11]

Application of the essential nexus/rough proportionality tests is further inappropriate here given the difficulty of mea-

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[11] Because the landlord in this case received and will continue to receive a fair rent under the RSL, regardless of whether Lenox Hill's employees occupy the Apartments, there was no basis for the lower court's conclusion that Chapter 940 resulted in an "unjustifiable burden draped disproportionately on the particular owners' shoulders." (10a) Chapter 940 specifically provided for a 15% "vacancy surcharge" as a substitute for vacancy increases that might otherwise have been available to landlords. (16a, 22a) As Judge Levine observed in his dissent, the lack of *any* evidence of an adverse impact on the landlord here "powerfully suggests" that there was little, if any, transfer of wealth from the landlord to the hospital lessee. (30a)

suring the required "fit" where there is no specific burden on the property owner which can be counterpoised against the interest advanced by the State. Indeed, the court below characterized the impact of the statute as "ephemeral" because the apartments were, and will remain, rent stabilized. Accordingly, although *Nollan*'s substantial advancement prong is distinct from the economic viability prong, where, as here, there has been no *per se* violation, such as a physical intrusion, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or restriction on disposition, *Hodel v. Irving*, 481 U.S. 704 (1987), the heightened scrutiny tests have no coherence.[12]

Finally, in light of the State's obligation to compensate for all takings, even those of a temporary nature, *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987), the application of close scrutiny and the granting of compensatory relief in every situation where the impact of general legislation is imprecisely connected with some clear or explicit legislative goal could chill the willingness of state and local legislative bodies to consider a wide range of hitherto acceptable measures addressing public health, safety and welfare concerns. Overly broad application of such principles will lead to the obvious fear that at least some applications of general law may fail to meet the exacting scrutiny demanded by these standards and, in aggregate, may result in costly damage claims against the State, which

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[12] The court below assumed, without deciding, that Chapter 940 violated the landlord's reversionary interest, on the theory that the landlord had no expectation of recovering the Apartments because Lenox Hill is a corporation of perpetual existence. However, the court did "not consider [the issue] dispositive by itself in this case." (5a, 16a). In his dissent, Judge Levine correctly pointed out that the landlord's reversionary interest "is satisfied [*inter alia*,] by the ability to remove a financially or behaviorally irresponsible tenant. . . ." (25a) *See* 9 NYCRR § 2524.3. Moreover, in 1976, when the landlord purchased the building, Lenox Hill leased 18 apartments, but has since relinquished three. (36a) In addition, the rent stabilization system, including its tenure protections, is subject to an orderly termination if the citywide vacancy rate rises above 5%. N.Y. Unconsol. L. § 26-414; N.Y. Unconsol. L. § 8623[b].

could, in the long run, paralyze the ability of state and local governments to meet pressing environmental, land use and consumer welfare concerns.

For these reasons, the test to be applied to an amendment to a legislative enactment which regulates the use of property must be a more flexible standard than that applied to unconstitutional exactments. This case provides the Court with an opportunity to so hold.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, New York
March 17, 1995

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Petitioner
The State of New York
120 Broadway
New York, New York
10271
(212) 416-8025

VICTORIA A. GRAFFEO
Solicitor General

LILLIAN Z. COHEN*
JUNE DUFFY
TIMOTHY COLLINS
Assistant Attorneys General
of Counsel

* Counsel of Record